

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 172 of 1999
with
CIVIL APPLICATION No 6242 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA Sd/-

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
1 to 5 No

AMRUTKHAN KALANDARKHAN BIHARI

Versus

AFZALKHAN AMINKHAN BIHARI

Appearance:

MR MH RATHOD for Appellants

MR SS BELSARE for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 12/08/1999

ORAL JUDGEMENT

The original defendants, being aggrieved and dissatisfied with the discretionary order dated 12.1.1999 recorded below Ex.5 & 22 in Special Civil Suit No.9 of 1998 by the learned Civil Judge (S.D.) at Palanpur confirming the ad-interim injunction granted earlier

below Ex.5 till disposal of the suit in favour of the plaintiff and dismissing the application Ex.22 filed by the defendants, have now invoked the appellate jurisdiction of this Court under the provisions of Section 104 read with Order 43 Rule 1 (R) of the Code of Civil Procedure, 1908 challenging the impugned order.

2. The original plaintiff is the present respondent whereas the original defendants are the present appellants and for the sake of brevity and convenience, the parties hereinafter will be referred as 'plaintiff' and 'defendants' respectively in this judgment.

3. The case of the plaintiff as designed in the plaint Ex.5 as also application Ex.22 for ad-interim injunction briefly stated runs as under:

3.1 The plaintiff and the defendants are brothers. The dispute between the parties centres around one agricultural land bearing survey No.84 admeasuring 18 acres 33 gunthas situated in village Hebatpur taluka Palanpur district Banaskantha. The said property was partitioned between the plaintiff and the defendants. Since fertility of the said land was uneven, the plaintiff got admeasuring 7 acres 16 gunthas situated on the western portion of the land in his share while the defendants got 11 acres 7 gunthas on the eastern portion of the land, which was having less fertility, in their share. The dispute between the parties centres around 1 acre 32 gunthas situated in the middle of said survey number which, according to the plaintiff, was encroached upon by the defendants. Therefore, the suit was filed for a declaration and permanent injunction restraining the defendants from transferring the entire suit land which has come to the share of the defendants. Along with the suit, application Ex.5 was also filed claiming relief restraining the defendants from transferring the entire suit land by way of sale, mortgage etc. during pendency of the suit.

3.2 The defendants contested the said suit as well as application and claimed counter-injunction by filing application Ex.22 wherein they claimed injunction against the land admeasuring 7 acres 16 gunthas which has come to the share of the plaintiff and also claimed right of pre-emption if the plaintiff wanted to sell the said property.

3.3 After hearing learned advocate for both the parties, the learned trial Judge granted interim

injunction in favour of the plaintiff whereas he dismissed the application Ex.22 preferred by the defendants. It is this finding and order which is now impugned in this appeal at the instance of the defendants.

4. After having heard learned advocate Mr.Mehul Rathod for the appellants and learned advocate Mr.S.S.Belsare for the respondent, this Appeal from Order is required to be allowed in part, only on the premise that the plaintiff claimed injunction qua encroachment of 1 acre 32 gunthas of land by the defendants, though he has made prayer for the entire land admeasuring 11 acres 7 gunthas which has come to the share of the defendants but admittedly, according to the plaintiff, 1 acre 32 gunthas of land has been encroached. Therefore, the learned trial Judge recorded erroneous order by granting injunction qua 11 acres 7 gunthas which has come to the share of the defendants, which requires modification by this court. Instead of injunction qua 11 acres 7 gunthas, there shall be injunction qua 1 acre 32 gunthas of land only which, according to the plaintiff, has been encroached by the defendants. Accordingly, the relief is required to be modified to the said extent.

5. Both the learned advocates appearing for the parties have not pressed for recording a reasoned order for allowing the Appeal from Order in part by modifying the relief granted by the learned trial Judge in favour of the original plaintiff. In view of the aforesaid statement, this court is refrained from recording reasoned order of allowing this Appeal from Order in part.

6. Resultantly, this Appeal from Order is allowed in part and accordingly it is partly allowed with no order as to costs. The order recorded by the learned trial Judge is modified by saying that the defendants shall not transfer or alienate the land admeasuring 1 acre 32 gunthas situated in the middle of survey No.84 till decision of the suit.

7. There shall be no order on Civil Application No.6242 of 1999.

(KMG Thilake)

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